FILED

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No. 99-____

IN THE
SUPREME COURT OF THE UNITED STATES

SONDRA SHEREN,

Petitioner,

v.

DAYTON HUDSON CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an employee asserting a claim under the Americans with Disability Act bear the burden of proving the existence and reasonableness of a proposed accommodation?

2. When an employee presents objective evidence that her performance as a salesperson was above average, may a district judge resolve a factual dispute on the employer's motion for summary judgment and find that the employee had been unable to perform her job?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sondra Sheren respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 18, 1999.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-2) and the opinion of the district court (App. 4-9) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 3) was entered on February 18, 1999.

STATUTE INVOLVED

This case involves the Americans with Disability Act, 42 U.S.C. §12101.

STATEMENT

In June of 1991, respondent hired petitioner as a sales associate in its furniture department at the Marshall Field's State Street store in Chicago, Illinois. Petitioner's duties included assisting customers with room plans, color schemes, showing them furniture, describing and demonstrating the features of individual pieces of furniture, going through fabric samples, coordinating orders between the initial sales order and the factory, and coordinating accessories, such as lamps, rugs, and tablecloths.

Petitioner's vision declined in the summer of 1995,[1] and

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1. Petitioner has significant visual impairments: she suffers from macular degeneration, has cataracts in each eye, is legally blind in her right eye and cannot see anything other than vague shadows with that eye. Plaintiff's visual condition is permanent, uncorrectable, and degenerative.

she began to have difficulty doing her job. Petitioner told Jack Sullivan, her department manager, "[t]hat my eyes had deteriorated and that I don't know if I could continue without some kind of assistance." Sullivan, who had never observed petitioner have any problem doing her job, directed petitioner to speak with Assistant Human Resources Manager Susan Varga.

Petitioner told Varga that "my vision had reached a point where I didn't know if I could continue in my job or if perhaps another job could be found for me." Varga subsequently gave petitioner disability forms to be completed by petitioner's physician.

Petitioner delivered her physician's form to Varga on August 22, 1995.[2] Petitioner also provided Varga with materials describing aids to assist the visually impaired. Varga requested information from petitioner's physician as to whether there was any medical procedure that would enable petitioner to see better. Thereafter, petitioner and Varga discussed alternative positions for petitioner.

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2. The form stated in pertinent part as follows:

> Patient has two problems (1) loss of vision (2) chronic vertigo. Can only see fingers at 1 [foot] in [right] eye and decreased vision in [left] eye from myopia and macular degeneration. She has significant problems with color differentiation, depth perception, and reading. Has difficulty with ambulation because of decrease in vision and vertigo.
>
> Patient legally blind in left eye and has significant uncorrectable vision in right eye with myopia and macular degeneration.

Petitioner continued to work as a sales associate through the summer of 1995 and did not experience any increased difficulties in working.

In mid-September of 1995, Varga told petitioner that she must go on short term disability leave. Petitioner responded that she wanted to continue to work. Varga told petitioner that the leave would begin the following Saturday, thereby permitting petitioner to continue to work until the end of the current sale. Varga also told petitioner that she would not be allowed to return for other sales.

Petitioner began her short-term disability leave in September of 1995 and promptly filed a charge of employment discrimination with the EEOC, alleging *inter alia* that she had been forced to go on disability leave because of her disability.

After discovery, respondent moved for summary judgment, conceding that petitioner was disabled, but asserting that "[n]o reasonable accommodation would have allowed Petitioner to continue working as a sales associate or in any other job." Petitioner opposed the motion, relying on the fact that she had been able to work productively as a sales associate even after requesting an accommodation. Petitioner relied on the deposition testimony of plaintiff's supervisor Jack Sullivan that he had:

> [N]ever observed plaintiff having trouble assisting customers on the sales floor; no one every told Sullivan that plaintiff was having trouble doing her job; Sullivan never observed plaintiff having trouble assisting customers and pointing out specific product features; no one ever told Sullivan that plaintiff was having trouble assisting customers and pointing out specific product features; Sullivan never observed plaintiff having difficulty performing accurate paperwork processing; no one ever told Sullivan that plaintiff was having trouble performing accurate paperwork processing; Sullivan

> never saw plaintiff having trouble in accurately processing point-of-sale transactions; no one ever told Sullivan that plaintiff was having trouble in accurately processing point-of-sale transactions.

Petitioner also pointed out that respondent had failed to come forward with any evidence to show that either of two proposed accommodations — installation of a magnification machine and keeping the store aisles clear of blockages — would have been unreasonable.

The district court granted respondent's motion for summary judgment, finding that "by the time [petitioner] requested [an accommodation,] her eyesight had already deteriorated to the point that she could not effectively perform her essential duties." (Pet.App. 6.) The district court characterized as "immaterial" petitioner's evidence that no one had ever observed her having trouble assisting customers, (Pet.App. 6), relying on petitioner's testimony that she had been having problems reading numbers in catalogs and on merchandise tags and because of statements from petitioner's physician that petitioner had "significant problems with color differentiation, depth perception, and reading." (Id.) The district court also relied on statements petitioner made in January of 1996 in a Social Security disability report.[3] (Pet.App. 6.)

The district court accepted respondent's assertions that the accommodations requested by petitioner were unreasonable. (Pet.App. 7-8.) Petitioner had argued that respondent had advanced these assertions without evidentiary support (Pet.App. 8), but the district court ruled that the absence of evidence was unimportant because petitioner bore the burden

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3. Petitioner had stopped working at Fields in September of 1995.

of proof on the reasonableness of the proposed accommodation. *(Id.)*

On appeal, petitioner argued *inter alia* that the district court had misallocated the burden of proof on petitioner's proposed accommodation and had erred in rejecting the proposed accommodation without the submission of evidence other than the arguments of respondent's counsel. The Seventh Circuit affirmed on the basis of the district court's opinion. (Pet.App. 1-2.)

REASONS FOR GRANTING THE WRIT

A. Burden of Proof of Accommodation

Under the Americans with Disability Act, discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such [employer]." 42 U.S.C. § 12112(b)(5)(A). There is a conflict among the circuits as to whether the burdens of production and persuasion on the issues of reasonable accommodation and undue burden are properly placed on the plaintiff or the defendant, or are divided between them.

The minority view, followed by the Seventh Circuit in this case (Pet.App. 8), is that the burden is on the employee to prove the existence and reasonableness of the proposed accommodation. This is the rule in the Eleventh Circuit and in the District of Columbia Circuit. *Barth v. Gelb,* 2 F.3d 1180, 1186 (D.C.Cir. 1993); *Carr v. Reno,* 23 F.3d 525, 529 (D.C.Cir. 1994); *Taylor v. Food World, Inc.,* 133 F.3d 1419, 1425 (11th Cir. 1998); *Willis v. Conopco,* 108 F.3d 272 (11th Cir. 1997).

The courts of appeals for the Second, Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuit have followed the analysis of *Borkowski v. Valley Cent. School Dist.,* 63 F.3d 131, 138

(2d Cir. 1995) that once the disabled employee proposes an accommodation that is objectively reasonable, the employer bears the burden of proving that the proposed accommodation is unreasonable or would cause an undue hardship on the the employer. *See, e.g., Walton v. Mental Health Association of Southeastern Pennsylvania,* 168 F.3d 661, 670 (3d Cir. 1999); *Riel v. Electronic Data Sys. Corp.,* 99 F.3d 678, 682 (5th Cir. 1996) *Cehrs v. Northeast Ohio Alzheimer's Research Center,* 155 F.3d 775, 781 (6th Cir. 1998); *Benson v. Northwest Airlines, Inc.,* 62 F.3d 1108, 1112 (8th Cir. 1995) *Zukle v. Regents of the University of California,* 166 F.3d 1041, 1048 (9th Cir. 1999); *Woodman v. Runyon,* 132 F.3d 1330, 1344 (10th Cir. 1997)

In this case, petitioner suggested to her employer that installation of a stationary high powered magnification machine would allow her to continue to work as a salesperson. Respondent did not come forward with any evidence to the contrary, and conceded that at the time petitioner requested an accommodation, she had been performing at an average or above average level. Nonetheless, the district court concluded that petitioner had failed to meet her burden of proving that the proposed accommodation was reasonable and would not impose an undue hardship. (Pet.App. 8.)

Petitioner's claim would have proceeded to trial in at least six circuits, but in three circuits, including the Seventh Circuit, plaintiff's claim could not survive summary judgment. Certiorari should be granted to resolve this conflict.

B. Summary Judgment

Petitioner presented objective evidence that her performance as a salesperson was above average and pointed out that her supervisor had neither observed her having trouble assisting customers nor had received any complaints about her performance. (Pet.App. 6.) In the view of the district court, this evidence was "immaterial" because petitioner had requested an accommodation for her vision problems. (Id.)

In *Hunt v. Cromartie*, ___ U.S. ___ (No. 98-85, May 17, 1999), this Court reminded the lower federal courts that disputed facts should not be resolved at the summary judgment stage. This is precisely the vice of the district court opinion, which contains findings on disputed issues — "I find that . . . by the time [petitioner] requested [an accommodation] her eyesight had already deteriorated to the point that she could not effectively perform her essential duties." (Pet.App. 6.) Similarly, even though petitioner was making furniture sales up to the time respondent forced her to stop working, and absent any evidence to the contrary, the district court found that petitioner "could not effectively assist customers in selecting furniture, fabrics, and accessories as required of a furniture sales associate." (Id.) The Court should correct this erroneous resolution of disputed questions of fact at the summary judgment stage.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

May, 1999

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3166

SONDRA SHEREN,

Plaintiff-Appellant,

DAYTON HUDSON CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 CV 2171—**James B. Zagel** *Judge.*

ARGUED February 12, 1999—DECIDED February 18, 1999

Before POSNER, Chief Judge, FLAUM and EASTERBROOK, Circuit Judges.

Order

Sondra Sheren suffers from macular degeneration, has cataracts in both eyes (and is legally blind in one), and cannot read small print or distinguish fine differences in color or pattern. These limitations (coupled with vertigo associated with her loss of vision) posed obstacles to her work as a sales associate in the furniture department of a large store. Sheren told her supervisor that she could not go on without assistance; her physician, more emphatic, opined that she was "[u]nable to continue in current position", period.

Sheren's employer placed her on disability leave and, when disability benefits ran out, ended her employment. In this suit under the Americans with Disabilities Act, Sheren insists that the department store could have found some accommodation that would have enabled her to continue working. But, as the district judge observed, the principal

suggested accommodation—a magnifier so large that it would have been immobile—would not have helped Sheren to advise customers on color choices, and the need to walk back to the magnifier throughout the dat would have unduly hajpered sales, given that the furniture department covers an entire city block (and that Sheren often bumped into things in the aisles). Plaintiff's challenges to the grant of summary judgment do not persuade us that the district court erred, and we affirm substantially for the reasons given by the district judge. 1998 U.S. Dist. LEXIS 12061 (N.D. Ill.).

AFFIRMED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3166

SONDRA SHEREN,

Plaintiff-Appellant,

DAYTON HUDSON CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 CV 2171—**James B. Zagel** *Judge.*

[February 18, 1999]

JUDGMENT — WITH ORAL ARGUMENT

Honorable Richard A. Posner, Chief Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SONDRA SHEREN,

Plaintiff,

No. 96 CV 2171 *v.*

DAYTON HUDSON CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

In June 1991, defendant Dayton Hudson Corporation hired plaintiff Sondra B. Sheren to work in the furniture department at the Marshall Field's store on State Street in Chicago, Illinois.

In the summer of 1995, Sheren informed her supervisor that her eyesight had deteriorated to such an extent that it was interfering with her ability to perform her job. After unsucessfully exploring ways to accommodate her disability with a Marshall Field's assistant human resources manager, Sheren went on short term disability leave in September 1995. Apparently, Sheren has not worked for Dayton Hudson since then.

On April 17, 1996, Sheren filed a complaint against Dayton Hudson alleging discrimination under the Americans With Disabilities Act ("ADA"), 42 U.S.C.§12101, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.§621 et seq. Subsequently, Sheren waived her ADEA claim, and now, Dayton Hudson moves for summary judgment on the ADA claim. Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c). The non-

party may not rest on the pleadings if it bears the burden of proof on an issue, that party must instead show that there is a gunuine issue of material fact. *Vanasco v. Naitonal Louis University,* 137 F.3d 962, 965 (7th Cir. 1998).

Discussion

The ADA probibits discrimination against a qualified individual with a disability based upon such disability. 42 U.S.C.§12112(a). Defendant argues that Sheren is not a "qualified individual" because she cannot show she was qualified to perform her job as a furniture sales associate. A "qualified individual" is one "who, with or without reasonable accomodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C.§12111(8). Sheren contends that she was a qualified individual because she possessed the "requisite skill, experience, education and other job-related requirements", 29 C.F.R.§1630.2(m), of her job as proven by her success a productive salesperson. Defendant does not dispute that Sheren possessed the skills and experience necessay to perform as a furniture sales associate. But to prove that she was a qualified individual Sheren also needs to show that she could "perform the essential functions of [her] position, deteriorated.[1] The parties agree that the functions of a furniture sales associate at Marshall Field's included assisting customers with room plans and color schemes, showing furniture, presenting fabric samples and corrdinating accessories, such as lamps and rugs, with furniture. Sheren alleges that even after she requested an accommodation for her disability

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1. According to the federal regulations interpreting the ADA, a "qualified individual with a disability" is an individual with "[1] the requisite skill, experience, education and other job-related requirements...*and* [2] who . . . can perform the essential functions of such position." (Emphasis added).

she continued to work as a sales associate without experiencing any increased difficulties at work. I find that it is apparent from the record that even if Sheren did not experience increased difficulties at work after requesting an accommodation, by the time she requested one her eyesight had already deteriorated to the point that she could not effectively perform her essential duties. On August 8, 1995, Sheren told Marshall Field's Assistant Human Resources Manager Susan Varga that she was having problems reading numbers in catalogs and on merchandise tags and that she might not be able to continue in her job. This inability to read small numbers carried over to other parts of her job. In a disability report filed with the Department of Health and Human Services, Sheren explained that she could not "distinguish the fine differences in appearance of furniture or fabrics—I cannot read catalogues, brochures, computer screens which are essential for my job." Sheren's disability was also confirmed by letters from her personal physician, Dr. Bowser, which Sheren transmitted to Varga on August 22, 1995 and on August 24, 1995. In these letters Dr. Bowser opined, inter alia, that Sheren had a "loss of vision," "significant problems with color differentiation, depth perception, and reading[,]" and "will need to fine [a] new position taking in consideration her visual disabilities." This evidence clearly shows that without an accommodation Sheren could not effectively assist customers in selecting furniture, fabrics, and accessories as required of a furniture sales associate.

Still, Sheren contends that her supervisor, Jack Sullivan, testified he never observed her having trouble assisting customers or received complaints about her performance. I find that given Sheren's own testimony and her physician's contentions that she had trouble performing her job and assisting customers, these allegations regarding Sullivan are immaterial.

Could Sheren have performed her job with a reasonable accomodation? The ADA provides that "discrimination"

includes an employer's failure to "mak[e] reasonable accommodations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . ." 42 U.S.C.§12112(b)(5)(A). To satisfy the accommodation requirement "the employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work." *Vande Zande v. State of Wisconsin Dept. of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995). Sheren contends that defendant failed to consider the accomodations that she suggested and, instead, ordered her to take a disability leave. Defendant contends that the five accommodations that Sheren proposed — i.e., create a new position; provide her with an assistant; allow her to ask her customers to perfomr some of her duties; place a magnification machine at her desk; or keep the store aisles clear of blockage — were not reasonable. Because Sheren only disputes the reasonableness of the latter two proposed accommodations, I address them now and find that Sheren waived any arguments that the other accommodations would have been reasonable. *See Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997). Defendant contends that placing a magnification machine at Sheren's desk would disrupt operations and negatively affect customer service because Sheren's work area included two floors of the store — each of which comprised a city block — where furniture is located and parts of other floors where accessories are located. I agree with defendant that given this large work area it would be have been unreasonably inconvienient for Sheren to return to her desk and consult a magnifier installed there every time she needed to see merchandise in which customers showed interest. Second, defendant argues that keeping the store aisles clear would not have been a reasonable accomodation because it would not have enabled Sheren to perform her customer service duties of discerning characteristics of fabrics, furniture, and accessories and it would have been impractical given that employees and customers

are constantly moving furniture around on the floor to create new displays and assess furniture arrangements. If defendant were to keep the aisles clear it would have likely prevented Sheren from accidentally bumping into furniture and facilitated her ability to move around the floor, but this is not an accomodation that would have addressed her ability to see, distinguish, and describe the furniture and upholsteries that she had the duty, as a furniture sales associate, to sell to customers. Sheren does not dispute this. She merely claims that defendant lacks evidentiary support for its arguments. But Sheren, not defendant, bears the burden of proof on this issue, see *Sieberns*, 125 F.3d at 1022-23, and she provides none. She also fails to present any evidence that defendant did not consider her proposed accommodations. I accept defendant's explanation for why it rejected Sheren's proposed accommodations as unreasonable or ineffective.

Additionally, the record shows that defendant engaged in a dialogue with Sheren to try to reasonably accommodate her. *See Bultemeyer v. Forte Wayne Community Schools*, 100 F.3d 1281, 1285-86 (7th Cir. 1997) ("The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.") (citing 29 C.F.R. pt. 1630, app; *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1135 (7th Cir. 1996) (internal quotations omitted)). Specifically, defendant's assistant human resources manager Susan Varga met with Sheren several times and discussed other types of jobs that she might take instead of the furniture sales associate position. Varga researched the availability of other open positions, but she did not find one that fit Sheren's own desired criteria and health restrictions. Varga also considered creating a new position for Sheren handling telephone orders for furniture, but she rejected the idea after Sullivan, Sheren's supervisor told her that this would unfairly affect the rest of the sales associates who ordinarily share these duties.

I find that the defendant engaged in a dialogue with Sheren and considered making changes to enable her to work but was unable to discover a reasonable accommodation that would fulfill this purpose. Further, because Sheren cannot show she could perform her job with or without a reasonable accommodation, she does not fall within the class of persons protected by the ADA.

Conclusion

Dayton Hudson's Motion for Summary Judgment is granted.

ENTER:

/s/James B. Zagel
United States District Judge

Supreme Court, U. S.
FILED
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(2)

No. 98-1876

In The

Supreme Court of the United States

SONDRA SHEREN,

Petitioner,

v.

DAYTON HUDSON CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 29.6

Dayton Hudson Corporation has no parent Company and no non-wholly owned subsidiaries.

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OPPOSITION TO PETITION FOR CERTIORARI

This is a simple case involving the straightforward application of summary judgment standards under the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). On April 12, 1996, Petitioner Sondra Sheren ("Sheren") filed a complaint in the United States District Court for the Northern District of Illinois alleging, *inter alia*, that Respondent Dayton Hudson Corporation ("Marshall Fields" or the "Company") had violated the ADA by failing to reasonably accommodate her visual impairment. At the close of discovery, Marshall Fields filed a motion for summary judgment based upon stipulated facts. Marshall Fields argued that, based on those stipulated facts, Sheren could not establish that she was a "qualified individual with a disability." The District Court granted summary judgment in favor of Marshall Fields, concluding that "because Sheren cannot show she could perform her job with or without a reasonable accommodation, she does not fall within the class of persons protected by the ADA" (App. 9).

On February 18, 1999, just six days after oral argument, the United States Court of Appeals for the Seventh Circuit (in a two-page unpublished opinion) summarily and unanimously affirmed the District Court's decision "substantially for the reasons given by the district judge" (App. 2). Sheren did not seek any rehearing in the Seventh Circuit.

Sheren seeks this Court's review of the Seventh Circuit's decision on two grounds. First, Sheren contends that the Seventh Circuit concluded that one of her proposed accommodations – the installation of a stationary

magnification machine[1] – was unreasonable based on a misallocation of the burden of proof (Pet. at 5-6). This contention is meritless. The Seventh Circuit's decision did not turn on the allocation of the burden of proof. Instead, the Seventh Circuit's decision turned on the evaluation of all of the stipulated record evidence regarding Sheren's proposed accommodation which, as a matter of law, established that the accommodation was not reasonable because it was not effective. Specifically, both the District Court and the Seventh Circuit held that Sheren's proposed accommodation was "unreasonable or ineffective" because it would not enable Sheren to perform the essential functions of her job (App. 7-8). This conclusion is not altered by the placement of any burden of proof. Furthermore, all of the ADA cases cited by Sheren (Pet. at 5-6) agree that a plaintiff has the burden of proving that an accommodation is effective and would enable her to perform the essential functions of the job. Accordingly, there is no dispute among the Circuits regarding this issue.

Second, Sheren contends that the District Court improperly resolved factual issues on summary judgment (Pet. at 6-7). At most, Sheren alleges that the District Court misapplied a properly stated rule of law – an issue over which this Court will "rarely" grant certiorari. *See S. Ct. R. 10.* Moreover, Sheren is wrong. The stipulated facts established that Sheren was unable to perform her

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[1] Although Sheren also mentions the accommodation of keeping the store aisles clear (Pet. at 4), because she did not raise that matter before the Seventh Circuit, she is barred from raising it before this Court.

job without reasonable accommodation, and Sheren presented no "objective evidence" (Pet. at 6) to the contrary. Accordingly, Sheren presents no issue justifying this Court's review.

COUNTER STATEMENT OF THE CASE

Sheren's statement of the case conspicuously ignores several facts – all of which were stipulated – that were critical to the District Court's and Seventh Circuit's decisions.

In June 1991, Marshall Fields hired Sheren to work as a furniture sales associate at its State Street store in Chicago, Illinois. Sheren was responsible for helping customers select room plans, color schemes, furniture, fabric samples, and accessories located on the eighth, ninth and other floors. Sheren's job required that she read retail tickets, catalogues, brochures, and computer screens and distinguish fine differences in the appearance of furniture and fabrics.

From 1991 through 1995, Sheren's vision deteriorated to the point where she was legally blind in one eye and could perceive only larger shapes with the other eye. Sheren's visual condition is permanent, uncorrectable, and degenerative. Sheren believed that her visual impairment was beginning to affect her job performance. In August 1995, after experiencing various problems with performing her duties, Sheren advised her supervisor that her "eyes had deteriorated and that [she didn't] know if [she] could continue without some kind of assistance." Sheren also told Marshall Fields' Assistant

Human Resources Manager that due to her "vision" she "didn't know if [she] could continue in [her] job."

Sheren's personal physician confirmed her belief in two August 1995 written statements to Marshall Fields. In the first, he advised Marshall Fields that Sheren "has significant problems with color differentiation, depth perception, and reading. Has difficulty with ambulation because of decrease in vision and vertigo." In the second note, which is ignored by Sheren in her petition,[2] he stated unequivocally that Sheren is "unable to continue in current position – will need to find new position taking in consideration her visual disabilities."

Marshall Fields did seek other positions for Sheren. However, none were available within the geographical restrictions imposed by Sheren (*i.e.*, she was willing to consider only certain stores) and which she could perform with or without reasonable accommodation. As a result, in September 1995, Marshall Fields placed Sheren on a short-term leave of absence while it continued seeking open positions for her. Unable to identify any available position Sheren could perform, Marshall Fields placed her on long-term disability until she retired in September 1996.

Before the District Court and the Seventh Circuit, Sheren claimed that Marshall Fields should have accommodated her by installing a stationary magnification

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[2] Sheren's failure to refer to this second note violates Supreme Court Rule 14(4), which is sufficient reason for this Court to deny the petition.

machine. The undisputed evidence regarding this proposed accommodation established: (1) Sheren's physician had advised the Company that Sheren was "unable to continue in current position;" (2) the essential functions of Sheren's job required her to accompany customers around several sales floors, each the size of a city block, providing them with information regarding and helping them to coordinate various pieces of furniture, fabric, and accessories; (3) while walking around the sales floor, customers frequently ask questions about retail tags or a fabric swatch which would require Sheren to carry the item over to the immobile magnification machine to answer; and (4) the stationary magnification machine would not enable Sheren to coordinate accessories, furniture and fabric from many floors.

REASONS FOR DENYING THE WRIT

I. Neither The District Court's Nor the Seventh Circuit's Decision Turned On Which Party Bears The Burden Of Proof Regarding Reasonable Accommodation

Sheren attempts to manufacture a legal issue where none exists. The case before the District Court and Seventh Circuit was fact intensive. Sheren claimed that a stationary magnification machine was a reasonable accommodation. Based on the stipulated factual record regarding the essential functions of Sheren's job, the nature of Sheren's visual impairment, and the ineffectiveness of her proposed accommodation, the District Court

and Seventh Circuit easily concluded that the magnification machine did not constitute a reasonable accommodation because it would not enable Sheren to perform the essential functions of her job. This fact intensive holding is ill-suited for Supreme Court review.

Furthermore, the lower courts' decisions are correct. The essence of Sheren's job at Marshall Fields was customer service. As a furniture sales associate, Sheren assisted customers with room design, color schemes, and the selection of furniture, fabric and accessories. By August 1995, Sheren's eyesight had deteriorated to the point that she could hardly see and was tripping over furniture in the showroom. Sheren claimed that installing a large, immobile magnification machine near her desk was a reasonable accommodation. To even use the stationary magnification machine, however, Sheren would have to walk to her desk on the eighth floor from anywhere on the eighth, ninth or other floors whenever a customer had a simple question about a retail tag, color scheme or fabric swatch. Moreover, the magnification machine would not enable Sheren to coordinate furniture, fabric, and accessories from different floors or, for that matter, to see where she was going as she walked around the sales floors. Accordingly, the Seventh Circuit agreed with the District Court that the proposed accommodation was "unreasonable or ineffective" (App. 7-8).

Notably, the District Court's and the Seventh Circuit's decisions did not depend on which party bore the burden of proof. After reviewing the stipulated record, the lower courts concluded that the stationary magnification machine would not enable Sheren to perform the essential functions of the job and was thus "unreasonable

or ineffective" (App. 7-8). The lower courts' decisions would be the same regardless of which party possessed the burden of proof.

II. Contrary To Sheren's Contention, There Is No Conflict Among The Circuits

Even if the burden of proof were important to the lower courts' decisions, this Court should deny Sheren's petition. All of the ADA cases cited by Sheren agree that a plaintiff bears the burden of proving that an effective accommodation exists, *i.e.*, one which would enable her to perform the essential functions of a job.[3] *See Walton v. Mental Health Ass'n*, 168 F.3d 661, 670 (3rd Cir. 1999) ("the plaintiff must show, as part of her burden of persuasion, that an effective accommodation exists that would render her otherwise qualified"); *Riel v. Electronic Data Systems Corp.*, 99 F.3d 678, 683 (5th Cir. 1996) ("reasonable accommodation is an element of a prima facie case of discrimination under the ADA . . . and [plaintiff] thus bears the burden of proof of reasonableness," *i.e.* that an accommodation "is reasonable in the run of cases"); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 781 (6th Cir. 1998) ("employee must establish that a 'reasonable' accommodation is possible, and bear a traditional burden of proof that she is qualified for the

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[3] These cases only differ in their allocation of the burden of proving that an otherwise effective accommodation is cost-effective. This distinction is irrelevant to the District Court's and Seventh Circuit's decisions, however, because neither considered the cost of Sheren's proposed accommodation. In fact, no cost information was presented to either court.

position with such reasonable accommodation"); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995) (employee has burden of persuading trier of fact that he is qualified to perform the essential functions of the job with or without reasonable accommodation);[4] *Zukle v. Regents of the University of California*, 166 F.3d 1041, 1046-47 (9th Cir. 1999) (plaintiff must establish "the existence of a reasonable accommodation that would enable him or her to perform the essential functions of an available job"); *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1425 (11th Cir. 1998) ("the burden is on [plaintiff] to prove the existence and reasonableness of such accommodation") (*citing Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997)). This is also the law in the Seventh Circuit. *See Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1022-23 (7th Cir. 1997) ("plaintiff bears burden of proof on this issue; she must be able to show that she is a 'qualified individual with a disability' in order to successfully prosecute an ADA claim").

In Sheren's case, the Seventh Circuit concluded that, based on the stipulated facts, her proposed accommodation of a stationary magnification machine was "unreasonable or ineffective" because it would not enable Sheren to perform the most essential function of her job –

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[4] Although *Benson* suggests a burden-shifting approach to the issue of reasonable accommodation, 62 F.3d at 1112, more recent Eighth Circuit cases explain that a plaintiff bears the burden of proving that a reasonable accommodation, enabling him to perform the essential functions of his job, is possible. *See, e.g., Buckles v. First Data Resources, Inc.*, ___ F.3d ___, 1999 WL 346107 (8th Cir., June 2, 1999); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998).

adequate customer service (App. 7-8). Under each of the ADA cases identified by Sheren, the plaintiff *at a minimum* bears the burden of proving that an effective accommodation exists. Because the undisputed evidence established that Sheren's proposed accommodation was ineffective, the Seventh Circuit correctly concluded that Sheren had not met her "burden of proof on this issue" (App. 8) under the law of the Seventh and every other Circuit.

III. The District Court Did Not Resolve Factual Issues On A Motion For Summary Judgment

Finally, Sheren argues that this Court should grant her petition for a writ of certiorari because the District Court erroneously resolved disputed questions of fact at the summary judgment stage. Besides providing an insufficient basis for this Court to grant a petition for writ of certiorari – Supreme Court Rule 10 provides "a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law" – Sheren's argument is absurd.

Sheren contends that the lower courts improperly resolved a genuine issue of material fact regarding whether Sheren was able to perform the essential functions of the furniture sales associate position *without* reasonable accommodation. The stipulated facts permit no other conclusion. In August 1995, Sheren advised her supervisor that, due to her visual impairment which created on-the-job problems and errors, she did not know if she could continue performing her job. That same month, her personal physician advised the Company that Sheren

was "unable to continue in current position." Contrary to her claim (Pet. at 6), Sheren presented no "objective evidence" that her performance was above average. Rather, Sheren claims that her supervisor's lack of knowledge of her visual impairment (apart from Sheren's conversation with him) and his belief that Sheren's performance was average or above average creates a genuine issue of material fact regarding her ability to perform the job without a reasonable accommodation. This statement is irreconcilable with the undisputed fact that Sheren and her doctor repeatedly told the Company that Sheren was unable to perform her job. The Seventh Circuit correctly concluded that Sheren's supervisor's *lack of independent knowledge* of Sheren's problems was "immaterial" (App. 6). More relevant to Sheren's petition, this entire argument is simply a fact-based argument under settled Fed. R. Civ. P. 56 standards undeserving of review by this Court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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